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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SERGIO BENT,

Plaintiff and Appellant,

v.

MARCIA J. BREWER,

Defendant and Respondent.

B283400

(Los Angeles County
Super. Ct. No. BC620371)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Michael Johnson and Alan S. Rosenfeld,
Judges. Reversed.

Bent Caryl & Kroll and Steven M. Kroll for Plaintiff and
Appellant.

Manning & Kass Ellrod, Ramirez, Trester, Fredric W.
Trester and Nicole M. Threlkel for Defendant and Respondent.

Plaintiff and appellant Sergio Bent (Bent) appeals from a judgment entered in favor of defendant and respondent Marcia J. Brewer (Brewer) following her successful motion for judgment on the pleadings. Bent argues that the trial court erroneously found that Bent's claims were time-barred.

We agree with Bent that the trial court erred. The trial court's order granting Brewer's motion for judgment on the pleadings was based upon its erroneous order granting judicial notice of certain documents and reliance upon those documents. It follows that Bent's action is not time-barred. Accordingly, we reverse the judgment.

FACTUAL¹ AND PROCEDURAL BACKGROUND

I. Factual Background

A. Bent signs Exhibit A

In September 2008, Robert Jones, who Bent knew to be a homeowner in Bent's residential community (Tract 19051), presented Bent with an exhibit to be attached to a request for a temporary restraining order (TRO) filed on behalf of the Tract 19051 Homeowners Association (the HOA). The exhibit was a document titled "Exhibit A." Jones represented to Bent that he was procuring signatures from homeowners residing in Tract 19051 on Exhibit A in order to stop another homeowner, Maurice Kemp (Kemp), from conducting construction on his home. Jones

¹ "Because this matter comes to us on [a motion for judgment on the pleadings], we take the facts from plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether [the] plaintiff has stated a viable cause of action. [Citation.]" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.) We also cite to portions of the Court of Appeal and Supreme Court opinions in the underlying lawsuit.

further represented that Exhibit A would only be used as an exhibit in support of the TRO. And, Jones represented that should the attorneys Timothy Howett and Howett Isaza Law Group LLP (collectively Howett) be required to name Bent as an individual plaintiff in the proceeding, Howett would contact Bent to obtain consent.

Bent signed Exhibit A believing that it would only be used as an exhibit to support the TRO. He did not believe that by signing Exhibit A he was agreeing to be a named plaintiff in any lawsuit.

B. Bent is named as a plaintiff in a lawsuit against Kemp

On September 29, 2008, Howett filed a complaint on behalf of the HOA and certain individual homeowners against Kemp (the Kemp Lawsuit). Even though Bent had never met Howett or anyone from his firm, Bent was named as a plaintiff in the lawsuit.

C. Ken Mifflin (Mifflin) associates in as counsel

On October 29, 2008, Mifflin filed a notice of association of counsel on behalf of the HOA and all individually named lot owners of Tract 19051, including Bent, in the Kemp lawsuit.

D. Brewer files a substitution of attorney

On September 2, 2009, Brewer filed a substitution of attorney, substituting in as counsel of record for the HOA, replacing Howett. The substitution of attorney is signed by Howett, Brewer, and "David Winston - President." Brewer did not discuss the substitution of attorney with Bent or obtain his signature on the form.

E. Judgment against the plaintiffs in the Kemp Lawsuit, including Bent, and subsequent appeals

On January 29, 2010, Brewer and Mifflin obtained an interlocutory judgment on behalf of the plaintiffs in the Kemp Lawsuit. At some point in the Kemp Lawsuit, Kemp passed away and the ownership interest of his property transferred to Eric Yeldell (Yeldell). Yeldell intervened in the lawsuit and then filed a motion to vacate the interlocutory judgment. (*Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135, 1139.) Eventually Yeldell obtained a judgment against the plaintiffs in the Kemp Lawsuit, including Bent, and was awarded attorney fees and costs. (See *Tract 19051 Homeowners Assn. v. Kemp* (May 15, 2013, B235015) [nonpub. opn.])

Represented by Mifflin, the plaintiffs appealed the judgment and award of attorney fees. Although the notice of appeal was filed on behalf of all of the plaintiffs, some of the plaintiffs dismissed their appeals. Notably, Mifflin and Brewer, who were plaintiffs in the Kemp Lawsuit, are two of the individuals who dismissed their appeals. On May 15, 2013, the Court of Appeal affirmed the judgment for Yeldell, but reversed the award of attorney fees. (*Tract 19051 Homeowners Assn. v. Kemp, supra*, B235015.)

The California Supreme Court granted review of the attorney fee issue; Brewer and Mifflin appeared on behalf of the plaintiffs and appellants. (*Tract 19051 Homeowners Assn. v. Kemp, supra*, 60 Cal.4th at pp. 1137–1138.) On March 5, 2015, the Supreme Court reversed the Court of Appeal judgment insofar as it reversed the attorney fee award in favor of Yeldell. (*Tract 19051 Homeowners Assn. v. Kemp, supra*, 60 Cal.4th at pp. 1139, 1154.)

F. Bent learns that he was named as an individual plaintiff in the Kemp Lawsuit and that a judgment was entered against him

According to the second amended complaint (SAC), the operative pleading, Bent first learned that he had been named as an individual plaintiff in the Kemp Lawsuit on June 4, 2015, when he received a letter from Brewer advising him of such. Brewer's letter, sent to all plaintiffs named in the Kemp Lawsuit, provides, in relevant part, that she had "come to learn that many of you did not know you were named as Plaintiffs in the [Kemp] lawsuit. I also have learned that many of you signed a document stating you were supporting the neighborhood, and by signing this did not believe you were obligating yourself to be a Plaintiff." She further wrote that Howett "had an obligation to communicate with each Plaintiff that he named in the complaint, confirm that you wanted to be part of the lawsuit and give you an idea of your benefits and burdens, if you agreed to be a Plaintiff. To those of you that signed the sheet which indicated at the top you understood you were going to be a Plaintiff in this lawsuit, this might be considered sufficient communication. For those of you that did not sign anything and found yourself a Plaintiff, it was not sufficient."

In addition, Brewer stated that she "had no connection with the case as an attorney until a year after the First Amended Complaint had been filed. I had no idea what was occurring regarding the naming of individual Plaintiffs in the Complaint and First Amended Complaint by [Howett]. *I had agreed to be a Plaintiff and was aware I was named in the Complaint. . . .* However, I had no knowledge as to how all the other Plaintiffs came to be named." (Italics added.)

Brewer's letter continued: "This letter is written so each of you have the information you need to potentially work with an attorney of your choice as this matter goes forward into its next [phase] of attorneys fees on appeal."

Brewer then advised as to the status of the case, notifying the recipients that the trial court had originally awarded Yeldell attorney fees and costs in the amount of \$82,601.44. Brewer also informed the recipients that Yeldell was seeking an additional \$187,958 in attorney fees and costs on appeal.

G. Mifflin and Brewer move to be relieved as Bent's counsel

On June 21, 2015, Brewer and Mifflin sent a letter to Bent (and others), demanding that he provide them with a written letter agreeing that they would continue their legal representation of Bent (and others); they also requested that Bent enter into a retainer agreement with either Brewer or Mifflin. When he refused to do so, Mifflin and Brewer moved to be relieved as his (and others') counsel. Their motion was granted on August 13, 2015.

H. Yeldell's successful motion for attorney fees and costs related to appellate matters in the Kemp Lawsuit

On January 4, 2016, the trial court granted Yeldell's motion for attorney fees and costs related to appellate matters in the Kemp Lawsuit. As a result, Bent became jointly and severally liable to Yeldell for an amount in excess of \$300,000, and a lien was placed on his house.

II. *Procedural Background*

A. The SAC

On May 13, 2016, Bent filed a complaint against Brewer and other attorneys for fraud, breach of fiduciary duty, and

professional negligence. On December 29, 2016, he filed the SAC, the operative pleading. The SAC alleges three causes of action against Brewer: fraudulent concealment, professional negligence, and breach of fiduciary duty. As set forth above, the SAC alleges that Bent did not become aware of defendants' malfeasance until June 4, 2015, when he received Brewer's letter.

B. Brewer's motion for judgment on the pleadings

Brewer responded to the SAC by filing a motion for judgment on the pleadings. She argued that Bent's SAC was time-barred. In support, she requested judicial notice of two key documents. First, Brewer requested judicial notice of Exhibit A. Although Exhibit A is referenced in the SAC, it was not attached as an exhibit to the pleading. Exhibit A provides, in relevant part: "I/we authorize [Howett] to name the undersigned as plaintiffs along with other homeowners owning property in . . . Tract 19051 . . . in a Los Angeles County Superior Court lawsuit against . . . Kemp . . . to seek to enforce the one story height restrictions in place for the Tract 19051 development, and to stop . . . Kemp . . . from constructing the two-story residence already under construction." According to Brewer, Bent's signature on Exhibit A confirms that he knew that Howett was filing a lawsuit on his individual behalf against Kemp.

Second, she asked the trial court to take judicial notice of e-mail conversations between Brewer and Bent that occurred on March 12, 2015, confirming that Bent knew about the lawsuit and his status as an individually named plaintiff.

In light of these documents, Brewer claims, because Bent did not file his lawsuit against her until May 13, 2016, his claims were time-barred.

C. Bent's opposition

Bent opposed Brewer's motion. He argued that his claims were not time-barred because the statute of limitations was tolled due to delayed discovery. He also opposed Brewer's request for judicial notice. Regarding Exhibit A, Bent asserted that it was ambiguous. Given the misrepresentation that it all it did was support a request for a TRO, the trial court should not take judicial notice of its contents. And, in any event, it was not a retainer/consent agreement.

As for the e-mail communications between Brewer and Bent, they consisted of hearsay that is "wholly improper" for judicial notice.

D. Trial court order; judgment; appeal

After entertaining oral argument, the trial court granted Brewer's motion for judgment on the pleadings on the grounds that Bent's claims were time-barred. In so ruling, the trial court granted all of Brewer's requests for judicial notice. According to the trial court, the "judicially noticeable documents establish [Bent's] knowledge that he had authorized the Howett Firm to represent him in the Underlying Action in September 2008 and that [Bent] knew that the Underlying Action had been filed on his behalf at least as of March 2015 through communications with . . . Brewer."

The trial court rejected Bent's assertion that Exhibit A would only be used as an exhibit to a request for a TRO and would not include him as a plaintiff in the Kemp Lawsuit. "This allegation is directly contrary to the document that [Bent] signed, which clearly and unambiguously states 'I/we authorize the law firm of [Howett] . . . to name the undersigned as plaintiffs along with other homeowners . . . in a Los Angeles County Superior

Court lawsuit” Moreover, the March 2015 e-mail communications between Brewer and Bent demonstrates Bent’s “clear knowledge” that he was an individually named plaintiff in the Kemp Lawsuit.

Given that this was Bent’s third pleading, the trial court denied him leave to amend.

Judgment was entered, and Bent’s timely appeal ensued.

DISCUSSION

I. Standard of review and applicable law

“The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer: We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein. . . . We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any theory. [Citation.]’ [Citation.]” (*Burd v. Barkley Court Reporters, Inc.* (2017) 17 Cal.App.5th 1037, 1042.)

The grounds for a motion for judgment on the pleadings “shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice.” (Code Civ. Proc., § 438, subd. (d).) “Where the motion is based on a matter of which the court may take judicial notice pursuant to Section 452 or 453 of the Evidence Code, the matter shall be specified in the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit.” (*Ibid.*) “““[J]udicial notice of matters upon [motions for judgment on the pleadings] will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.’ [Citation.]” [Citation.]” (*Unruh-*

Haxton v. Regents of University of California (2008) 162 Cal.App.4th 343, 365 (*Unruh-Haxton*).)

“Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.’ [Citation.]” (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) “[W]hile courts are free to take judicial notice of the *existence* of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files. [Citation.] Courts may not take judicial notice of allegations in affidavits, declarations and probation reports in court records because such matters are reasonably subject to dispute and therefore require formal proof.” (*Ibid.*)

“The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is *not reasonably subject to dispute*. [Citations.] ‘By making an order establishing the law of the case, it seems that the facts are no longer in dispute and can therefore be considered true as set forth in an order, findings of fact, or conclusions of law.’ [Citation.] Such facts would not be the proper subject of judicial notice. [Citation.]” (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort, supra*, 91 Cal.App.4th at p. 882.) “The appropriate setting for resolving facts reasonably subject to dispute is the adversary hearing. It is therefore improper for courts to take judicial notice of any facts that are not the product of an adversary hearing which involved the question of their existence or nonexistence. [Citation.] ‘A litigant should not be bound by the court’s inclusion in a court order of an assertion of

fact that the litigant has not had the opportunity to contest or dispute.’ [Citation.]” (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort, supra*, 91 Cal.App.4th at p. 882.)

We apply the abuse of discretion standard in reviewing a trial court’s ruling on a request for judicial notice. (*CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 520.)

II. *Analysis*

A. Judicial notice

Applying the foregoing legal principles, we conclude that the trial court erred in taking judicial notice of Exhibit A and the e-mail communications between Brewer and Bent, and then granting Brewer’s motion for judgment on the pleadings based upon the contents of those documents. The import and contents of those documents are subject to dispute.²

Regarding Exhibit A, Bent alleges that his signature on the document was fraudulently induced and that the document itself was fraudulently represented by Jones on Howett’s behalf to be an exhibit in support of a TRO as opposed to consent to be named as an individual plaintiff in the Kemp Lawsuit. Thus, at least at

² The fact that the trial court took judicial notice of Exhibit A when it sustained a prior demurrer with leave to amend does not mean that the trial court made a finding regarding the import of Exhibit A. Likewise, we reject Brewer’s argument that the trial court’s refusal to vacate the judgment in the Kemp Lawsuit “as to any plaintiff who signed a writing that authorized [Howett] to file an action against Kemp” constitutes a finding that allowed the trial court here to take judicial notice of Exhibit A and use it to bar Bent’s action. Nothing in that January 15, 2016, order demonstrates that Exhibit A was tested pursuant to an adversarial hearing.

this stage of the litigation, Exhibit A could not have imputed knowledge to Bent and/or conveyed valid consent to his participation as a plaintiff in the Kemp Lawsuit. (See, e.g., *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415.)

Moreover, as for the e-mail communications, the trial court accepted the statements therein as having definitively established that Bent knew of his status as an individual plaintiff in the Kemp Lawsuit at least by March 2015. But, in Brewer's June 4, 2015, letter to Bent and others, of which the trial court also took judicial notice, Brewer herself acknowledged that some of the recipients of her letter did not know that they were named as plaintiffs in the Kemp Lawsuit. And that is what Bent actually alleges in the SAC—that he did not know that he was an individual plaintiff in the Kemp Lawsuit. Because of this critical factual dispute, and the fact that “a hearing on [a motion for judgment on the pleadings] cannot be turned into a contested evidentiary hearing” (*Unruh-Haxton, supra*, 162 Cal.App.4th at p. 365), judicial notice of the e-mail communications was improper.

In urging us to affirm the trial court's order granting judicial notice, Brewer argues that the trial court properly took judicial notice of Exhibit A and the e-mails because they fall within an exception to the hearsay rule; in other words, they constitute admissible evidence. Regardless of whether that is true, those documents were not properly considered in connection with a motion for judgment on the pleadings, which, as set forth above, is not an evidentiary proceeding.

Having determined that Exhibit A and the e-mails should not have been considered by the trial court, we next determine

whether Bent's claims are time-barred based upon the allegations of the SAC (without reference to the challenged documents).

B. Timeliness of Bent's claims

““In order for the bar [of the statute of limitations] to be raised by demurrer [or motion for judgment on the pleadings], the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred. [Citation.]” [Citation.]’ [Citation.] Thus, a demurrer based on the statute of limitations lies only where the dates in question are shown on the face of the complaint.”

(*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1553.)

As pled, Bent's claims are timely.

He alleges three causes of action against Brewer: fraudulent concealment, professional negligence, and breach of fiduciary duty. “An action for relief on the grounds of fraud or mistake must be commenced within three years. However, such action is not deemed accrued ‘until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.’ (Code Civ. Proc., § 338, subd. (d).) The courts interpret discovery in this context to mean not when the plaintiff became aware of the specific wrong alleged, but when the plaintiff suspected or should have suspected that an injury was caused by wrongdoing. The statute of limitations begins to run when the plaintiff has information which would put a reasonable person on inquiry” (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1373–1374.)

Here, Bent alleges that he became aware of the alleged fraud on June 4, 2015. Because he initiated this lawsuit on May 13, 2016, well within three years, his claim for fraud is timely.

And, his claim for professional negligence is also timely. Code of Civil Procedure section 340.6, subdivision (a), provides, in relevant part: “An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.” The statute further provides that the statutory period is tolled during the time that either “[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred” or “[t]he attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney.” (Code Civ. Proc., § 340.6, subds. (a)(1) & (3).)

Again, Bent alleges that he was unaware of Brewer’s negligence until June 4, 2015, partly because she (and others) concealed information from him. Because he filed his lawsuit on May 13, 2016, this claim is timely.

Finally, Bent’s claim for breach of fiduciary duty is timely. It seems that this cause of action is governed by the same one-year statute of limitations as his claim for professional negligence. For the same reasons set forth above, this cause of action is not time-barred.

C. Sufficiency of the SAC

Brewer’s motion for judgment on the pleadings appears to have based solely upon her contention that Bent’s lawsuit was untimely. On appeal, the parties raise the issue of whether Bent’s causes of action were sufficiently pled and/or pled with

adequate specificity. For the sake of completeness, because we are reviewing the SAC de novo, we reach the merits of this issue.

1. *Fraudulent concealment*

“[T]he elements of a cause of action for fraud based on concealment are: “(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. [Citation.]” [Citation.]’ [Citation.]” (*Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 850.) “Fraud causes of action must be pled with specificity in order to give notice to the defendant and to furnish him or her with definite charges.” (*Gil v. Bank of America, N.A.* (2006) 138 Cal.App.4th 1371, 1381.)

Bent’s fraudulent concealment claim is sufficiently pled. First, he alleges that Brewer and others failed to disclose material information that they had a duty to disclose to Bent, including the fact that a lawsuit had been filed on his behalf and the fact that they were representing him in the Kemp Lawsuit even though they never obtained his consent to do so. He also alleges that Brewer did not disclose the fact that she was a named plaintiff in the Kemp Lawsuit, thereby giving rise to a conflict of interest. Second, as his alleged attorney, Brewer was under a duty to disclose these facts to Bent. Third, Bent alleges that Brewer intentionally concealed these facts with the intent to defraud him, “because [she and the other attorneys] were trying

to distance themselves from the judgment [in the Kemp Lawsuit] and trying to extort [Bent] and other inappropriately named individual plaintiffs into contributing to the satisfaction of the judgment.” Fourth, Bent alleges that he was unaware of the facts and, had he known, “he could have acted to avoid having a judgment entered against him in the Kemp Lawsuit.” Finally, he alleges damage, including but not limited to the judgment entered against him in the Kemp Lawsuit.

2. *Professional negligence*

“In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney’s negligence. [Citations.]” (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1200.)

These elements are sufficiently pled. Bent alleges: “As a result of the Defendants’ unilateral decision to file the Kemp Lawsuit on [his] individual behalf, Defendants owed a duty of care to [him] to perform with the requisite skill required of competent counsel.” But, Brewer and the other attorneys did not do so. They failed to provide him with a copy of the requisite retainer agreement, and they appeared in the Kemp Lawsuit (both in the trial court and on appeal) without Bent’s authorization. Moreover, Brewer failed to obtain a conflict waiver or inform him that she was representing numerous parties in the Kemp Lawsuit. She also failed to disclose that she herself was a plaintiff for a while in the Kemp Lawsuit. These

acts constitute acts of professional negligence, which, according to the SAC, caused Bent's alleged damages.

3. *Breach of fiduciary duty*

"[A] breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence. [Citations.] The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. [Citation.]" (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.)

These elements are sufficiently pled. The SAC alleges that "Defendants owed [Bent] a duty of care, undivided loyalty and confidentiality when they unilaterally undertook to represent [him] in the Kemp Lawsuit and the subsequent appeal of the judgment without his validly obtained, legal consent." Brewer and the others breached this duty by "making the fraudulent and deceitful statements referenced above, concealing material facts from [Bent] as set forth above and by engaging in the above referenced misconduct and negligence." And, Bent was damaged.

DISPOSITION

The judgment is reversed. Bent is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT